

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.1007 OF 2007

V.Diwakaran	Petitioner
versus	
M.N.Nair	Respondent

Mr.S.D.Patil for petitioner.
Mr.D.B.Patil for respondents.

CORAM : A.S.OKA, J.

DATE : 06th March 2007

PC :

1. Heard learned advocates appearing for the parties. Advocates appearing for both the sides state that both the parties are personally present in the Court. By consent, the petition is taken up for final disposal at the admission stage. The petitioner is the defendant who has suffered a money decree in the sum of Rs.7,52,500/- with interest thereon @ 18% p.a. in a suit filed by the respondent. The decree was passed on 15th July 2005.

2. The petitioner applied for setting aside the ex-parte decree by invoking provisions of Order IX, Rule 13 of the Code of Civil Procedure, 1908.

There was a delay in applying for setting aside the ex-parte decree. Delay was of 304 days. Application for condonation of delay made by the petitioner has been rejected by order dated 20th December 2006 passed by the Trial Court. The said order has been impugned in this petition under Article 227 of the Constitution of India.

3. The learned advocate appearing for the petitioner submitted that considering the averments made in the application for condonation of delay and especially averments made in paragraph no.5 of the said application, the Trial Court ought to have adopted a liberal approach and ought to have condoned the delay of 304 days. He submitted that without prejudice to the rights and contentions of the petitioner, he is willing to deposit a sum of Rs.2.00 lakh in the Trial Court and he is ready and willing to furnish adequate security for the balance decretal amount. Learned advocate for the respondent submitted that there is material on record to show that the petitioner attended to other legal proceedings to which he was a party. He submitted that in reply to the suit notice, the petitioner admitted the claim of the respondent. He, therefore, submitted that no interference was

called for. Without prejudice to the said submission he urged that in case this Court is inclined to condone the delay subject to the petitioner depositing Rs.2.00 lakh and furnishing security for the balance amount, the impugned decree may be set aside and a time bound programme may be fixed for the disposal of the suit. He submitted that the respondent may be permitted to withdraw the sum of Rs.2.00 lakh which may be deposited by the petitioner.

4. I have considered the submissions. In paragraph no.5 of the application for condonation of delay, the petitioner has stated that his wife has been suffering from Blood Cancer and she has been undergoing treatment for cancer in Tata Memorial Hospital in Mumbai for last five years. It is stated that the petitioner is an old person and is required to take care of health of his wife and on number of occasions the wife is required to undergo blood transfusion. There may be some material to show that the petitioner attended to proceedings of a criminal case. Now the petitioner has offered to deposit a sum of Rs.2.00 lakh and to furnish security for the balance decretal amount.

5. While considering an application for condonation of delay it is well settled that a liberal and justice oriented approach is contemplated. This is not a case where the petitioner was negligent. Even if the delay is to be condoned and ex-parte decree is to be set aside, there is sufficient protection for the respondent- plaintiff in view of the offer made by the advocate for the petitioner. The respondent can be permitted to withdraw the sum of Rs.2.00 lakh which may be deposited by the petitioner subject to furnishing adequate security and subject to final outcome of the suit. Hence I pass following order.

6. ORDER :-

a) The application for condonation of delay made by the petitioner is allowed and the impugned judgement and decree dated 20th December 2006 will stand quashed and set aside subject to condition of petitioner depositing with the Trial Court a sum of Rs.2.00 lakh (Rs.Two lakh only) within a period of eight weeks from today and subject to a further condition of the petitioner furnishing within eight weeks from today adequate security for the entire balance decretal amount

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as of today to the satisfaction of the Trial Court;

b) The respondent will be heard before accepting the security;

c) If the amount is not deposited and the security is not furnished within the stipulated period, the impugned order will stand confirmed and the writ petition will stand rejected;

d) If compliance is made as aforesaid within the stipulated period, the judgement and decree dated 15th July 2005 in Special Civil Suit No.108 of 2004 will stand set aside and the suit will stand restored to the file of the Trial Court;

e) The petitioner will file his written statement in the suit within a period of three months from today. No further time will be granted to the petitioner to file written statement under any circumstances;

f) The Trial Court will decide the suit as expeditiously as possible and preferably on or before 31st December 2007;

g) The Respondent will be entitled to withdraw the sum of Rs.2.00 lakh (Rs.Two lakh only) deposited by the petitioner subject to furnishing adequate security or a bank guarantee of any nationalised bank to the satisfaction of the Trial Court. Withdrawal of the amount by the respondent will be subject to the final outcome of the suit;

h) All contentions of both the sides on merits in the suit are expressly kept open.

(A.S.OKA, J.)